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IN THE

Supreme Court of the United States

October Term, 1946.

No. 187.

Realty Operators, Inc., *Petitioner,*

v.

Commissioner of Internal Revenue, *Respondent.*

No. 188.

William Henderson (Partnership), *Petitioner,*

v.

Commissioner of Internal Revenue, *Respondent.*

No. 189

Laurence M. Williams, as Liquidator of Sterling Sugars, Inc., formerly a Louisiana Corporation, and Sterling Sugars Sales Corp., *Petitioners,*

v.

Commissioner of Internal Revenue, *Respondent.*

PETITIONERS' BRIEF IN REPLY

to Respondent's Brief in opposition to Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

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PETITIONERS' BRIEF IN REPLY

to Respondent's Brief in opposition to Petitions for writs of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The respondent in opposing the separate petitions for certiorari filed by the respective petitioners in the above causes has filed a single brief in opposition. So that our reply may conform to the practice adopted by the respondent, we file this single brief in reply.

BASIS FOR REPLY.

The brief of the respondent in opposition to the petitions for writs of certiorari in these causes is not responsive—that in a word sums up the confusion occasioned by the respondent's brief. It is our purpose to demonstrate that it is not responsive and that nothing contained therein can aid the Court in resolving the questions presented by the petitioners.

ARGUMENT.

Questions Presented.

The questions presented in the three petitions appear on page 6 of the respective petitions; and, in a consolidated form are:

1. Is the rule of law reestablished by this Court in *Dobson* v. *Com.* (320 U. S. 489)—whereby the function of the reviewing Court is limited to an ascertainment of whether there is a rational basis for the conclusions approved by the Tax Court and denying it the right to weigh all the evidence—applicable when this Court subsequent to the decision of the Tax Court construes the statute in a manner requiring the weighing of evidence more embracing than that weighed by the Tax Court in reaching its conclusions? (All three cases)

2. Where the Tax Court has decided a cause on a single finding of fact—ignoring all its other findings of fact—and then loses jurisdiction before this Court in another cause construes the applicable law in a manner requiring the weighing of the ignored findings of fact, will this Court grant certiorari to determine whether such decision is in accordance with law as this Court has subsequently construed the law? (All three cases.)

3. Was it error for the Tax Court to rest its decision on the *adoption of a policy* of passing the tax on to its vendees by an increase in the sale price of sugar (Henderson R. 33); instead of weighing the evidence to determine how far petitioner succeeded in passing on the tax (*Webre Steib*, 324 U. S. 174); and, did the Court err in failing to take cognizance of its finding of fact that the price did not respond continuously to the effort to shift the tax? (Henderson R. 32, 33; *Webre Steib*, 324 U. S. 174). (Henderson Petition.)

4. Did the Tax Court err in finding that following the increase of 55 cents "the fluctuation of sugar prices on the market after that date was from the higher level thus set" (Williams R. 87); when there is not a shred of evidence in support of such a finding? (Williams Petition.)

5. Did the Tax Court err in failing to weigh the margin rebuttal evidence adduced by the taxpayer in order to determine the "actual extent" of the tax burden borne or shifted as required by Section 907 (e) of the Revenue Act of 1936 (49 Stat. 1752)? This question is of particular importance due to the erroneous theory applied by the Tax Court in deciding the case. (Williams Petition.)

The respondent does not meet the issues raised in the above five questions—instead he presents one question which reads (Res. Br. 3):

> "Whether, in any of these cases, the Tax Court erred in holding that the taxpayers, each claiming refund under Title VII of the Revenue Act of 1936 of processing tax payments, failed to establish that they bore the ultimate burden of the tax."

We submit that the question posed by the respondent cannot be determinative of whether or not the writs should

issue—that question can only be answered by the Tax Court after this Court has remanded the causes with directions to weigh the evidence and apply the rule of law laid down by this Court in *Webre Steib Co. Ltd.* v. *Com.* (324 U. S. 164). It is the province of the Tax Court to weigh the evidence. When as is the case here, the correct construction of the law has been determined by this Court subsequent to the decision of the Tax Court; then, any preceding decision of the Tax Court not based upon the law as later construed by this Court is not in accordance with law and can only be corrected by remand for the weighing of the evidence material to such construction.

The first step in that direction is the granting of the writs of certiorari.

The Facts Advanced by the Respondent.

The respondent in his brief sets forth the following group of facts in support of his contention that the Tax Court correctly decided the cases (pages 5 to 13):

(a) The margin computation in each case;

(b) That the price of refined sugar was advanced on June 8, 1934;

(c) That the quota system of quantity control of sugar established by the Sugar Amendment to the Agricultural Adjustment Act which went into effect on June 8, 1934—the date of the advance in the price of sugar—resulted in a direct increase in the price of raw sugar (Res. Br. 8) and made it possible for the sugar industry to make some increase in the price of sugar on and after June 8, 1934 (Res. Br. 7);

(d) Records and letters of some of the petitioners:

From the foregoing set of facts the respondent concludes that there was substantial evidence sufficient to sustain the decisions of the Tax Court—entirely ignoring our contention that the Tax Court proceeded upon an erroneous con-

ception of the law and the Circuit Court failed to apply the law as pronounced by this Court.

With the respondent's theory we cannot agree. First, because the decisions are not in accordance with law—the law as this Court expounded it in *Webre Steib Co. Ltd.* v. *Com.* (*supra*). Secondly, because the above collective facts do not warrant decisions adverse to the petitioner. And, last, because the Tax Court did not decide the cases on the collective facts advanced by the respondent. To the extent that the Tax Court did rely on some of the aforesaid facts, it proceeded under an erroneous construction of the law—it therefore became the duty of the Circuit Court to remand or itself examine all the evidence. The Circuit Court could do this because in addition to the printed record in each case the exhibits introduced in evidence were physically delivered to the Circuit Court as part of the Record. (Realty R. 120; Henderson R. 158, 159; Williams R. 287)

(a) *The margin computations:* In none of the cases did the Tax Court rely upon the margin computation, nor the taxpayers accounting for the spread in margin as provided by Section 907(e)(1). In *Webre Steib* (*supra*) this Court referring to this provision of law said (p. 171):

> "The statute declares, however, that the presumption may be rebutted by proof of 'the actual extent' to which the burden of the tax was shifted. This language appears to mean that the presumption may be rebutted pro tanto, and not necessarily all at once or not at all. Thus it does not cease to operate on introduction of evidence merely sufficient to support a finding that some of the tax was shifted. It must be evidence sufficient to support a finding that the entire tax shifted. Short of that, the presumption is not eliminated but only diminished to the extent that the rebuttal evidence will support a contradictory finding. See E. Regensburg & Sons v. Helvering, 2 Cir. 130 F. (2d) 507, 509."

The reasoning of the Tax Court in *Realty Operators, Inc.* is so far afield from the rule of law pronounced above that it is apparent that its conclusion of law is not in accordance with law. In *Realty Operators, Inc.* the Tax Court made two different margin findings. It made a finding favorable to the taxpayer to the extent of 11.4 cents per hundred pounds (Realty R. 32) indicating a 23 percent absorption. It also made an unfavorable finding based upon different factors and the respondent seizes upon such unfavorable margin to unequivocately declare that the margins are all adverse to the taxpayers (Res. Br. 14, 15). The factors accounting for the difference between the two margins are caused by the different methods employed in computing cost—the favorable margin uses actual cost (Realty R. 32) and the unfavorable margin uses market value of cane (Realty R. 32). Is there a person so bold as to seriously contend that a theoretical market price of cane below the actual cost of such cane can result in a tax shift? It is the actual cost that has come out of the till of the taxpayer—not the market price at the time the cane is severed and transported to the factory. How can an actual cost expended result in a tax shift? Obviously, the unfavorable margin must first be corrected by the factor of the excess of actual cost of cane over market value; and when that is done the unfavorable margin is diminished and is in accord with the favorable margin—so that in fact there is but one margin and that is a favorable margin for the taxpayer.

In each case the taxpayer presented and in some cases the Tax Court made findings with respect to the taxpayers' accounting for the spread in margins (Realty R. 39, 40; Henderson 28-33; Williams R. 106-130). The presumption, as we understand it, is not a fixed factor. It is a fluctuating factor adjusted "pro tanto" by the various factors established other than the tax. If it can be diminished by correction it seems to us it can by the same methods by converted from an unfavorable margin to a favorable margin.

If the presumption can be diminished without losing its character as a presumption; then, logically, it remains a presumption—perhaps favorable, instead of unfavorable—if the factor that diminishes it is of sufficient magnitude to wipe out the unfavorable computation and result in a favorable computation.

The Tax Court made margin findings but did not weigh the rebuttal or accounting for the spread in margins. Its decisions therefore are not in accordance with law.

Instead of weighing the rebuttal or accounting for the spread in margins the Tax Court considered the price rise of June 8, 1934—even though *Realty* had no sugar to sell for some months before and after such date—conclusive.

The miscarriage of justice inherent in the cases at bar is emphasized by the subsequent conclusions of the Tax Court in another case. In *South Coast Corporation* (T. C. Memo Docket No. 2165 decided June 11, 1945)—another sugar case decided by the Tax Court after this Court pronounced the law—the Tax Court did not disregard the margins because the price advanced on June 8th; it followed the holding of this Court in *Webre Steib* (*supra*) and stated:

> "It must be remembered that fluctuations in price of refined sugar are due to many causes other than tax imposition."

Such are the words of Judge Leech—the same Judge who decided the case of one of your petitioners (*Laurence M. Williams*) adversely on the identical price rise. In the *South Coast* case he had the benefit of the pronouncements of this Court in *Webre Steib*—in the cases at bar neither Judge Leech nor the other Judges had the benefit of such pronouncements.

(b) *The price of refined sugar was advanced on June 8, 1934.* This incident was considered controlling under the law by the Tax Court in all three cases. This Court in *Webre Steib* (*supra*) page 174 did not hold the advance in

price of sugar on June 8, 1934 conclusive. It held that the margins were some evidence that the price "may not have responded continuously" to the effort to shift the tax. It indicated by citing Johnson that the cause of the price rise and its continuance were to be taken into account.

Here the Tax Court failed to test the cause or continuance of the effort to raise the price. More than that, it acknowledges in the line of proof captioned (c) above that the quota system of control directly caused an increase in the price of raw sugar (Henderson R. 30) and made possible an increase in the price of refined sugar on and after June 8, 1934 (Realty R. 40). Furthermore, the Tax Court found as a fact that Realty Operators had no sugar on hand to sell on June 8, 1934, the 1933 crop having been sold, and the 1934 crop not yet ready for harvest (Realty R. 32). The crop is harvested beginning in October (Realty R. 25).

It becomes evident therefore that a decision resting on an advance in price can only be in accordance with law if the advance was caused by the tax and if the price continued to respond to the effort to pass the tax on. If the price did not respond in full the question is to what degree, if at all, did the price respond to the effort to pass the tax on. In view of the finding in *Realty Operators, Inc.* (R. 32) that:

> "At this time (June 8, 1934) petitioner had no sugar on hand, the 1933 crop having been sold, and the 1934 crop not yet ready for harvest."

a finding that the claimant raised prices four months before the harvest (Realty R. 32) is obviously in error, and a fortiori, a decision on such wrong finding is not in accordance with law.

Realty Operators is a glaring example of the miscarriage of justice perpetrated by the Tax Court and continued by the Circuit Court; but, it only brings into bold relief the error committed by the Tax Court in all three cases at bar.

(c) *The quota system of control.* The Sugar Amendment to the Agricultural Adjustment Act lodged in the Secretary of Agriculture control of the quantity of production of sugar and its importation. Such control became effective June 8, 1934, the same date that the price of refined sugar became effective. Under the quota system the Secretary could raise or lower the quantity of sugar available for marketing.

Among the facts advanced by the respondent as substantial evidence in accordance with law is the finding of the Tax Court that the quota system caused a direct increase in the price of raw sugar (Res. Br. 8) and made it possible for the sugar industry to make some increase in the price of sugar on and after June 8, 1934 (Res. Br. 7).

These findings do not sustain the Tax Court's decisions that the price rise of June 8, 1934 was a passing on of the tax. They are in direct conflict with such decisions and establish beyond the shadow of a doubt that the decisions of the Tax Court are *not* based on substantial evidence and in accordance with law. It was within the province of the Circuit Court to remand on such conflicting findings; however, feeling itself restricted by the rule of law reestablished in *Dobson* v. *Com.* (320 U. S. 489) it failed to do so. This was error as obviously if the quota system caused the price increase, in whole or in part; at least, to such extent the increased price did not reflect a passing on of the tax.

(d) The respondent advances various letters and documents of the taxpayers in support of his position that the decisions of the Tax Court are correct. They are the type of evidence permitted by Section 907(e)(2) of the Act; however, the act further provides in the same section:

> "but the claimant may establish that such acts were caused by factors other than the processing tax, or that they do not represent his practice at other times."

Although the taxpayers submitted evidence explaining each item neither the Tax Court, the Circuit Court, nor the respondent have observed the foregoing provision of law. Under the circumstances the decisions, to the extent this line of proof is a factor, are not in accordance with law. We summarize each in turn:

Realty Operators, Inc.: The respondent advanced no evidence along this line at all.

Wm. Henderson: A memorandum made in a sales memorandum book by a sales manager now deceased under date of June 8, 1934 reads:

> "6/8/34—11:23 A. M. Advance to $4.65 to cover sugar processing tax."

The Tax Court failed to make a finding made by the same person in the same book under date of November 23, 1934 (Henderson R. 154) reading:

> "11/23/34—Decline in Arkansas, Shreveport, Illinois and west of Mississippi River to $4.40 less 10¢ carload allowance, less 2% for cash. Prices so chaotic each sale is a matter of trading."

The Tax Court also found as a fact that between April 30, 1934 and June 1, 1934 prices declines 40 cents from $4.50 to $4.10 (Henderson R. 29).

We submit that in view of a finding of a decline of 40 cents immediately before the advance and evidence of "chaotic" prices within five months of the imposition of the tax a decision that the June 8th price rise was a passing on of the tax for the entire period the tax was in effect does violence to the law.

In nineteen transactions during the period June to November 1934 Henderson billed the tax separately. The tax so billed amounted to $1,639.19 and forms no part of the refund sought (Res. Br. 8-9). We think that when only $1,639.19 out of $1,138,421.82 is billed separately, it is

very evident that the billing of the tax in such few instances is an exception and that the taxpayer has met the requirements of Section 907(e)(2) set out above. The same reasoning applies to the single sales contract covering 1600 pounds (Res. Br. 9) out of 235,557,801 pounds produced during the tax period (Henderson R. 28).

We submit that the foregoing incidents advanced by the respondent as evidence of the passing on of the tax, does in fact establish the claim of the petitioner that excepting in these isolated instances the tax was absorbed.

L. M. Williams: The respondent makes much of a rubber stamped legend appearing on sales contracts, maintaining that such legend indicates an intention to pass the tax on. The said legend, in fact, is anticipatory and does not take into account existing taxes (Williams R. 182). The taxpayer had no unfilled contracts at the close of business June 7th (Williams R. 215). No further taxes were imposed after June 8, 1934. The legend, intended to protect the taxpayer against taxes imposed on existing contracts never became operative—therefore it proves nothing.

The respondent cites a number of letters to the Collector seeking postponement of the payment of the tax as permitted by law (Res. Br. 11-12). The language of such letters is careless; but, bearing in mind the purpose of the letter, it is not indicative of passing on the tax. The amount of processing tax due the Government was tied up in inventory—until such inventory was converted to cash no funds were available to pay the tax. Such is the natural and unstrained interpretation to be placed upon the letters —not a commitment to pass the tax on.

The letter to the Commissioner regarding the amount of claim (Res. Br. 13) is very clearly a mistake of fact. The full and true facts were stipulated (Williams R. 203) and the stipulation was before the Circuit Court pursuant to the order submitting the Exhibits in physical form (Williams R. 285). The stipulation shows that the said letter

did no more than establish the quantity to taxpaid unsold sugar on hand January 6, 1936, which the taxpayer was entitled to recover from the Government because the tax imposed was unconstitutional.

CONCLUSION.

We have gone to great pains to analyze the facts relied upon by the respondent—even though they are not pertinent to the petitions for writs of certiorari—in order that the Court may be advised of their irrelevancy. The facts upon which we rely for the purpose of demonstrating that the decisions are not in accordance with law are set forth in the respective petitions and briefs.

The fact remains that this Court in *Webre Steib Co. Ltd. v. Com.* construed the law in a manner different than that applied by the Tax Court. The Tax Court had lost jurisdiction by the time *Webre Steib* was decided and could do nothing about these cases—it did, however, in a subsequent sugar case hold unimportant the price rise of June 8, 1934, which, prior thereto in the cases at bar it had held controlling. The Circuit Court, instead of examining the evidence to determine whether the unconsidered facts were required to be weighed in the light of *Webre Steib,* affirmed on the *Dobson* rule of law.

Under the peculiar circumstances of the intervening decision by this Court in *Webre Steib* we do not think the *Dobson* rule applies, because any decision not in accord with the law pronounced by this Court, cannot be in accordance with law and is therefore reviewable.

Again we urge that the writs issue. Otherwise a grave miscarriage of justice will be perpetuated.

Respectfully submitted,

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